

1997

Brad Russell Childs v. Heather T. Childs : Brief of Appellee

Utah Court of Appeals

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Harry Caston; Attorney for Petitioner/Appellee.

Randy S. Ludlow; Attorney for Respondent/Appellant.

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**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

BRAD RUSSELL CHILDS,)	
)	
Plaintiff/Appellee,)	Court of Appeals No 970258-CA
)	
vs)	
)	Civil No 954901350DA
HEATHER T CHILDS,)	
)	
Defendant/Appellant)	

BRIEF OF THE APPELLEE

**AN APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE TYRONE E. MEDLEY, PRESIDING**

Harry Caston
McKay, Burton & Thurman
Attorney for Plaintiff/Appellee
Suite 600, Gateway Tower East
10 East South Temple
Salt Lake City, UT 84133

Randy S Ludlow
Attorney for Defendant/Appellant
336 South 300 East, Suite 200
Salt Lake City, UT 84111-2504

FILED

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Attorney for Plaintiff/Appellee
Suite 600, Gateway Tower East
10 East South Temple
Salt Lake City, UT 84133

Randy S. Ludlow
Attorney for Defendant/Appellant
336 South 300 East, Suite 200
Salt Lake City, UT 84111-2504

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CONSTITUTIONAL PROVISIONS

None.

OTHER CITED AUTHORITIES

None.

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BRIEF OF THE APPELLEE

I. APPELLATE COURT JURISDICTION

Jurisdiction is proper in this Court pursuant to §78-2a-3(2)(h) and pursuant to Rule 3 of the Utah Rules of Appellate procedure.

II. STANDARD OF APPELLATE REVIEW WITH SUPPORTING AUTHORITY

A. The Appellee agrees with the Appellant that the first issue, whether Heather should have been estopped to claim that Brad Childs is not the adoptive father of Alex, would be reviewed under the correction of erred standard as set forth in Bailey v. Call, 767 P.2d 138 (Utah App. 1989).

B. Regarding the second issue raised by the Appellant, which is whether there was insufficient evidence to rebut the presumption that custody be awarded to the natural parent, the trial court's actions should not be disturbed unless the evidence clearly preponderates to the contrary or there has been an abuse of discretion. Woodward v. Woodward, 709 P.2d 393 (Utah App. 1985).

C. As to the third issue raised by the Appellant, that the evidence was insufficient to award the minor children to the plaintiff, the correct standard of review is whether the trial court abused its discretion. Woodward v. Woodward, 709 P.2d 393 (Utah App. 1985).

D. As to the issue of whether the trial court should have allowed the plaintiff to provide day care for the children, the correct standard of review is whether the trial court abused its discretion. Woodward v. Woodward, 709 P.2d 393 (Utah App. 1985).

E. As to the issue of whether Heather was awarded insufficient alimony, the correct standard of review is whether the serious inequity has resulted such as to manifest a clear abuse of discretion. Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991).

F. That on the issue of whether the trial court failed to award Heather sufficient attorney's fees, the correct standard of review is whether the trial court abused its discretion. Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991).

III. SUMMARY OF ARGUMENTS

A. In replying to Heather's first contention, that she should have been estopped from asserting that her former husband, Brad Childs, did not adopt Alex Childs, the Court is asked to consider that the trial court did not estop Heather from claiming that there had been an adoption. The trial court did estop Heather from asserting the natural parent presumption. The trial court properly estopped Heather from claiming the natural parent presumption based on the actions that she has undertaken over the years and the fact that the trial court found that if Heather were able to repudiate her actions, Brad or perhaps more importantly the minor child would suffer a detriment.

Regardless of whether Heather should be estopped from asserting the natural parent presumption, the trial court's conclusion can also be supported on the basis of waiver. Heather, through her actions, which are again set forth amply in the trial court's Findings of Fact, waived any rights she may have had to claim the natural parent presumption. These actions include, but are not limited to, Heather choosing not to assert the natural parent presumption but to rather seek custody of all three children and then require that Brad pay child support for all three children. Only when the custody evaluation did not come back in Heather's favor, did she attempt to assert the natural parent presumption.

B. If the Court finds that Heather should not have been estopped from asserting the natural parent presumption and that Heather did not waive the natural parent presumption, the Appellant then argues that the trial court was not required to impose the natural parent presumption as it did not serve the best interest of the parties' minor children. In support of this contention, the Appellee requests that the court review the Findings made by the trial court regarding Heather's behavior. The Appellee contends that this absolutely horrendous behavior would certainly have allowed the trial court to determine that applying the natural parent presumption was not in the best interest of the minor children.

C. Should the Court determine that Heather should not have been estopped from asserting the natural parent presumption, nor should the trial court's conclusion be supported by the doctrine of waiver, and that the trial court was required to apply the natural parent presumption, the Court is asked to consider that the trial court did properly conclude that the natural parent

presumption was rebutted and that Heather and Brad should stand on equal footing and that the trial court was to make a custody determination based on the best interest of the children. In support of this contention, Appellee makes reference to the Findings of Fact that the trial court made which detail Heather's horrendous, inhumane behavior. This emotionally abusive, horrendous, inhumane behavior also serves to show that the trial court did not abuse its discretion in not awarding Heather custody of the children and in refusing to allow Heather to provide day care for the minor children.

D. The final issues relate to whether the court abused its discretion in awarding Heather temporary alimony of \$350 per month and an attorney's fee of \$1,000. Related to these issues are the arguments that the trial court was well within its discretion to reduce any alimony award to Heather Childs on the basis of fault and that Heather has failed to demonstrate that Brad had an ability to pay her greater than an attorney's fee of \$1,000.

IV. STATEMENT OF FACTS

A. Factual Findings of the trial court which support its conclusion that Heather should be estopped from asserting the natural parent presumption.

1. That Heather and Brad Childs were married on December 14, 1990 (record, page 422)

2. That on January 6, 1988, Heather gave birth to the minor child known as Alex Childs. Brad Childs is not Alex's biological father (record, page 423)

3 Subsequent to the parties' marriage two children were born, Patches Childs, who was born on June 12, 1991, and Brooke Childs, who was born on September 8, 1993 (record page 423)

4 That during the marriage Brad provided the sole financial support for Alex (record, page 423)

5 Heather did not seek child support from Alex's biological father nor did the biological father provide financial support nor seek visitation or contact Alex in any way (record page 423)

6 That since the parties' marriage, Brad was the only individual who has ever acted as Alex's father Brad and Alex established a positive stable, nurturing, father/son relationship with Heather's aid, assistance, encouragement, and permission (record, page 424)

7 Immediately after the parties married, they agreed that Brad should adopt Alex (record, page 424)

8 Heather consistently told Brad, and other family members, that she wanted Brad to be on equal footing with all of the children in light of the mutual love, respect and honor shared by Brad and Alex (record, page 424)

9 That Brad and Heather sought legal advice regarding an adoption of Alex They learned of a one year waiting requirement and adoption costs At that time, Heather was pregnant and the parties had limited financial resources and were concerned about adoption costs (record, page 424)

10 Brad and Heather were later advised that Brad could formally adopt Alex by filling in his name on Alex's birth certificate and that doing so would be an inexpensive method of accomplishing the adoption (record, page 424)

11. Heather encouraged Brad to add his name to Alex's birth certificate to formalize the adoption Brad relied on Heather's advice and encouragement and both Brad and Heather believed that the adoption would be accomplished in this matter (record, pages 424 and 425)

12 Brad and Heather did complete the necessary paperwork for Alex's birth certificate to be amended representing Brad as Alex's biological father (record, page 425)

13 Both Brad and Heather believed that Brad had adopted Alex Throughout the marriage, Heather, Brad and Alex represented to everyone that Brad was Alex's father (record, page 425)

14 Brad relied on Heather's actions wherein Heather provided the opportunity for Brad and Alex to establish a father/son relationship (record, page 425)

15 That Brad and Alex would be injured if Heather were allowed to now assert the parental presumption (record, page 425)

B. Factual Findings of the trial court that support waiver

1 Brad filed his Complaint for divorce on March 31, 1995 Brad requested temporary custody of all of the minor children Heather filed a Motion for Temporary Custody in which she sought custody and child support for all three of the minor children without any challenge

to Alex's purported adoption (record, page 425)

2 Heather participated in the initial custody evaluation and did not communicate to the evaluator any challenge of Brad's purported adoption of Alex. The evaluation was completed on the premise that Brad had lawfully adopted Alex (record, page 425)

3 The custody evaluation was completed on September 26, 1995 and recommended joint custody with Brad having primary physical custody of all minor children (record, page 426)

4 That on October 25, 1995, after receiving the unfavorable custody evaluation, Heather, for the first time, filed an Answer and Counterclaim challenging Brad's adoption of Alex and asserting the natural parent presumption (record, page 426)

C Findings of Fact of the trial court that support its conclusion that the natural parent presumption had been rebutted

1 " , this court is unable to conclude that Defendant's bond to the children is strong, because she chose to have an affair with a married man and pursue her own needs to the detriment and sacrifice of the needs of her minor children. Defendant's horrendous verbal and emotional abuse of the minor children clearly establishes that the defendant lacks the sympathy for and understanding of the needs of her children that is characteristic of parents generally. The evidence is clear and convincing that defendant generally lacks all of the characteristics that give rise to the parental presumption " (record, page 434)

D Factual determinations made by the trial court that support its conclusion that the natural parent presumption was rebutted

1. " defendant began working three nights per week, spending time with friends on other nights and would regularly return home around 3 00 a m to 5 00 a m " (record, page 426).

2. "In approximately December of 1994, defendant spent an increasing amount of time with a married man, Allen M. Morrical. Defendant would spend time with Mr Morrical during the day, either at her home or at Mr Morrical's home while plaintiff was at work During this time defendant would leave the marital home or work most evenings to spend time with Mr Morrical, typically not returning to the marital home until early in the morning hours " (record, page 426)

3 "Defendant placed her relationship with Mr Morrical above and ahead of her parental duties and responsibilities which had a negative impact on her minor children " (record, page 427)

4 " that the defendant degrades the children, degrades the plaintiff in front of the children, resulting in emotional abuse of the children A few examples of the defendant's disparaging remarks made in the presence of the children include

"I hope your dad gets in a car crash and dies "

"Brad (plaintiff) doesn't love you "

"I don't know why I had you fucking kids."

"I'm fucking sick of you kids, I'm sending you to Green River."

"I don't give a fuck where plaintiff is, he is a worthless piece of shit anyway." (record, pages 427 and 428).

5. "Defendant is very vindictive, and angry as established by her regular disparaging remarks of plaintiff in front of their children. The testimony of family members, friends, the custody evaluation, and the defendant's demeanor on the witness stand further establish defendant's mean, vindictive nature. The defendant's vindictive nature makes her far less likely to allow plaintiff to maintain a healthy relationship with the children if defendant was awarded custody. In fact, the defendant has threatened to take the children to Mexico if plaintiff is awarded custody. Based upon defendant's level of anger, defendant's threat should be taken seriously." (record, page 428).

6. "The court finds that the defendant's moral character is certainly questionable based upon her untruthful testimony, her chicanery in trying to intentionally provoke plaintiff to hit her and defendant's conscious choice to place her individual needs and the demands of her extramarital affair above her children. Furthermore, defendant's regular swearing at the children, the derogatory remarks about plaintiff in front of the children, and defendant's inability to put the needs of the children above her own needs demonstrates poor emotional stability." (record, pages 429 and 430).

7. "The court finds that the defendant threatened plaintiff and his family that they will not see the children if the defendant is awarded custody. Based upon defendant's

continually harsh demeanor towards the plaintiff and his family, the court finds that the defendant is not likely to allow plaintiff to maintain frequent and meaningful contact with the children should she be awarded custody." (record, page 431).

E. Factual Findings of the trial court relating to Brad Childs' parental ability.

1. "Both prior to and subsequent to the parties' separation, the plaintiff has provided a stable environment for the children in which the children appear to be thriving." (record, page 429).

2. "Plaintiff is involved in the children's lives, is an appropriate disciplinarian and is supportive of the children's educational needs and extracurricular activities." (record, page 429).

3. "The plaintiff has kept the children well dressed and groomed and is watchful of the children when they are in his care." (record, page 429).

4. "During the pendency of this action the children have done well in plaintiff's primary care. Plaintiff has assisted Alex and Patches in their homework and other school and extracurricular activities. The children's best interests are served by continuing the previously determined custody arrangement with plaintiff in light of plaintiff's demonstrated sound moral character and emotional stability." (record, page 429).

5. "Plaintiff's desire for custody has been continual and deep. Plaintiff adjusted his work schedule so he could be available for the children. Plaintiff treated Alex as his own son without any distinction whatsoever. Plaintiff has maintained regular employment and is more able

to provide the necessary resources to raise the minor children. Plaintiff has demonstrated the ability to place the needs of the minor children above his own." (record, page 430).

6. "That plaintiff, with the assistance of his extended family, can provide quality personal and surrogate care for the children." (record, page 430).

POINT I

THE COURT CORRECTLY DETERMINED THAT HEATHER SHOULD BE ESTOPPED FROM ASSERTING THE NATURAL PARENT PRESUMPTION.

Point I (A.) of Heather's argument is entitled "THE DEFENDANT IS NOT ESTOPPED TO CLAIM THAT PLAINTIFF IS NOT THE ADOPTIVE FATHER OF ALEX." Heather goes on to argue that the adoption statutes must be strictly complied with; and that the purpose for this strict compliance is to protect the best interest of children. Heather concludes that as she and Brad did not strictly comply with adoption statutes that the trial court erred in estopping her from asserting that Brad is not Alex's adoptive father.

Heather has misstated the trial court's legal conclusion. The trial court did not conclude that Heather should be estopped from claiming that Brad had adopted Alex. The trial court did conclude that Heather was estopped from asserting the natural parent presumption.

Heather sets forth cases that support the argument that she should not have been estopped from asserting that Brad did not adopt Alex. There is no need to review those cases as the trial court did not conclude that Heather is estopped from asserting an adoption. The Appellee will take this opportunity to discuss the correctness of the conclusion the trial court did reach; that Heather be

estopped from asserting the natural parent presumption.

In Perkins v. Great-West Life Assurance Co., 814 P.2d 1125 (Utah App. 1991), this Court stated that:

Equitable estoppel is defined as "conduct by one party which leads another party in reliance thereon, to adopt course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." Id. at 1130 (citations omitted).

In the instant case, the trial court found that both of the requirements of estoppel had been met; conduct that induces reliance and that repudiation of that conduct would cause a detriment. Specifically, in Finding No. 13 (page 425 of the record) the trial court stated that Brad "relied upon defendant's actions wherein defendant provided an opportunity for plaintiff and Alex to establish a father/son relationship." As to the second requirement of estoppel; detriment caused by repudiation, the trial court stated (also in Finding No. 13), that "plaintiff and Alex would be injured if defendant were allowed now to assert the parental presumption..."

The trial court made more Findings. In these Findings the trial court set forth the numerous actions of Heather's upon which Brad relied upon. These findings are also set forth in subsection A of the Statement of Facts. Heather does not attack these findings. As the trial court did find that Brad relied on Heather's actions and found that both Brad and Alex would be injured if Heather were to assert the parental presumption, the trial court properly estopped Heather from asserting the natural parent presumption.

POINT II

HEATHER WAIVED ANY RIGHTS SHE MAY HAVE HAD TO CLAIM THE NATURAL PARENT PRESUMPTION.

The trial court's conclusion that Heather should be estopped from asserting the natural parent presumption can also be supported by the doctrine of waiver. Although the trial court did not base its ruling on waiver, the Appellee notes that in Embassy Group, Inc. v. Hatch, 865 P.2d 1366 (Utah App. 1993), this Court stated that:

"... we are also guided by the principle that this court may affirm a trial court's decision on any proper ground, even though the trial court may have premised its ruling on a different ground. Id. at 1370 (citations omitted).

In Beckstead v. Deseret Roofing Co., Inc., 831 P.2d 130 (Utah App. 1992), this Court defined waiver as:

"the voluntary and intentional relinquishment of a known right. To waive a right, there must be an existing right, knowledge of its existence, and an intent to relinquish it. The intent to relinquish a right can be implied from conduct, if the parties' conduct unequivocally evince(s) an intent to waive or (is) at least ... inconsistent with any other intent." Id. at 133 (citations omitted).

Heather waived any right she may have had to claim the natural parent presumption. Heather certainly knew she had a right to claim the natural parent presumption. The trial court found that when the custody evaluation came back in Brad's favor, Heather then attempted to claim the natural parent presumption. According to the decision in Beckstead the intention to relinquish a right can be implied from conduct. Heather's conduct does imply an intent to relinquish any right she may have had to claim the natural parent presumption. The trial court found that Heather initially chose

not to raise the natural parent presumption. The trial court found that Heather sought custody of all three children as well as to have Brad pay child support. Heather then participated in the custody evaluation, and did not tell the custody evaluator that Brad was not Alex's father. Only after the custody evaluation was completed and the custody evaluation recommended that Brad have primary custody and only after the court awarded Brad temporary custody of all three children did Heather seek to assert the natural parent presumption.

Having initially elected to waive any right that she may have had to assert the natural parent presumption, Heather should not be allowed, when it is strategically advantageous for her to do so, to then decide to assert the natural parent presumption.

POINT III

THE EVIDENCE WAS SUFFICIENT TO REBUT THE NATURAL PARENT PRESUMPTION.

Heather contends the evidence was not sufficient to rebut the natural parent presumption. In Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982) the Court addressed a dispute between a natural mother and a stepparent. The Court held that in considering disputes between parents and non-parents there is a presumption in favor of the natural parent. The Court held that the natural parent presumption can be rebutted by showing:

"evidence establishing that a particular parent at a particular time generally lacks all three of the characteristics that give rise to the presumption: (i) that no strong mutual bond exists, (ii) that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's, and (iii) that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally." Id. at 41.

In Hutchison the court also held that when the natural parent presumption is rebutted contestants stand on equal footing and custody is to be awarded as is required by the best interest of the child. Heather certainly has the right to argue that the evidence was insufficient to support the trial court's conclusion that the natural parent presumption was rebutted. With this right comes an obligation. According to the ruling in Riche v. Riche, 784 P.2d 465, (Utah App. 1989), Heather has the obligation to:

"marshall the evidence in support of the findings and then demonstrate that despite the evidence, the trial court's findings are so lacking as to be 'against the clear weight of the evidence', thus making them 'clearly erroneous'. Id. at 486.

Heather hardly makes what could be called an effort to marshall the evidence that supports the trial court's conclusion that Heather generally lacked the three factors that give rise to the natural parent presumption. Heather's cursory effort to marshall the evidence is to state that "the court merely determined which person would, in its view, be a better custodian, ... " That is not what the trial court did. As to the first requirement, that no strong mutual bond exists, the trial court stated: "This court is unable to conclude that defendant's bond to the children is strong, because she chose to have an affair with a married man and pursue her own needs to the detriment and sacrifice of the needs of her minor children." (Conclusions of Law Number 4, page 434 of the record). As to the second Hutchison factor, a parent's failure to sacrifice his or her own interest and welfare for the child, the trial court concluded that Heather " ... placing her affair was a pursuit of her own needs to the detriment of her children and demonstrated a lack of willingness to sacrifice her own needs for those of her children." (Conclusions of Law No. 4, page 434 of the record). As to the third

Hutchison factor, a lack of sympathy for and understanding of a child characteristic of parents generally, the trial court concluded that Heather's "horrendous verbal and emotional abuse of the minor children clearly establishes that the defendant lacks the sympathy for and understanding of the needs of her children that is characteristic of parents generally." The trial court concluded that the evidence "is clear and convincing that defendant lacks all of the characteristics that give rise to the parental presumption." (Conclusions of Law No. 4, page 434 of the record).

The trial court made numerous Findings that support the above mentioned conclusions. These factual Findings are set forth in detail in subsection D of the Statement of Facts.

Heather contends that the trial court erred because its Findings and Conclusions are different than the conclusion reached by the custody evaluator. It should be noted that the custody evaluator would have made Brad the primary custodian of the minor children. Heather seems to be suggesting that the recommendation of the custody evaluator is entitled to a presumption of unquestioned validity. As marvelous a job as custody evaluators do, they are not judges. It is the trial court judge who, based on all of the evidence must determine which custodial arrangement would be in the best interest of the children.

In Tuckey v. Tuckey, 649 P.2d 88 (Utah 1982), the Court held that:

"... although the trial court was not bound to accept the evaluation of the Department of Social Services, the court indicated no reason for totally dismissing the report submitted under court order. In light of the trial court's own factual findings which support the recommendation of the Department, we think some reason for rejecting the recommendation and awarding custody on the basis of rather frail findings is in order." Id. at 91.

The ruling in Tuckey suggests that where the trial court has made findings that are consistent with a custody evaluation yet rejects the conclusion of the evaluation, then the trial court should set forth Findings why the court is not following the evaluation. In paragraph 24 of its findings, (page 428 of the record), the trial court stated why it was not following the recommendation of joint custody. The court stated as follows: " However, this Court finds that based upon defendant's emotional instability and uncooperativeness, joint custody would not be in the best interest of the minor children "

POINT IV

THE TRIAL COURT NEED NOT APPLY THE NATURAL PARENT PRESUMPTION WHEN THE PRESUMPTION DOES NOT SERVE THE BEST INTEREST OF THE CHILDREN

Heather seems to suggest that the trial court had no option but to apply the natural parent presumption. Such a suggestion would be erroneous. Should this court find that Heather was not estopped from asserting the natural parent presumption or that Heather did not waive any right she may have had to claim the natural parent presumption, this Court is asked to consider that the natural parent presumption need not be applied when it does not serve the best interest of the children.

In Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987), the Court held that the three-prong test of Hutchison is flexible and is subservient to the child's best interest. Discussing the Hutchison requirement that there must be a general lack of the three characteristics of the Hutchison test, the Kishpaugh Court stated

"Hutchison itself indicates that it does not establish a wooden formula to which all trial court findings must conform . . . Obviously, a "general" lack is not an absolute lack. Thus, the standard articulated in Hutchison is somewhat flexible. . . Hutchison assures that a trial court will focus on three central characteristics in making its evaluation; however, the purpose of the presumption--furthering the best interests of the child--is in no way advanced by requiring a formulaic statement of the trial court's conclusions regarding those characteristics." Id. at 1251.

After holding that the Hutchison test is based on a presumption of serving the best interest of the child and is not to be mechanically applied, in a footnote the Court stated that the Hutchison test should not be used when it does not serve the best interest of the child.

"We have not hesitated to find the presumption inapplicable when we have concluded that it does not serve the best interests of the child in a particular class of cases." Id. at 1251.

The question in the instant case then becomes whether or not an application of the natural parent presumption served the best interest of the children. It can be argued that as the trial court concluded that the natural parent presumption was rebutted, that this question is academic. Nonetheless, the Court is asked to consider that the trial court need not have applied the natural parent presumption as the presumption did not serve the best interest of the children. The proof for this contention is found in the Findings of Fact that the trial court made regarding the parties. While the trial court made positive Findings regarding Brad and his ability to parent, the trial court referenced paragraph after paragraph, page after page of Heather's horrendous, inhumane actions. These actions are extensively detailed in subsection D of the Statement of Facts. Given these horrendous, inhumane actions, the trial court was not required to apply the natural parent presumption.

POINT V

THE EVIDENCE WAS SUFFICIENT TO DEMONSTRATE THAT THE MINOR CHILDREN SHOULD HAVE BEEN AWARDED TO BRAD

Despite mountains of evidence and explicit Findings made by the trial court, Heather claims that the evidence was insufficient to award the children to Brad. Throughout this brief the Appellee has made reference to the evidence and the factual Findings made by the trial court which support the conclusion that the best interest of the children required that they be awarded to Brad. As these facts have been amply set forth in preceding portions of the brief, as well as in the Statement of Facts, the Appellee will assert that a review of the Findings of Fact easily supports the conclusion that the trial court did not abuse its wide discretion in awarding custody of the children to Brad.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING HEATHER TO PROVIDE DAY CARE FOR THE MINOR CHILDREN

As has been set forth numerous time throughout this brief, the trial court found that Heather emotionally abused the children, placed her relationship with a married man above and ahead of her parental duties and responsibilities which impacted the children negatively, lied in open court, that Heather degrades the children and Brad, is vindictive and angry, has threatened to take the children to Mexico, (a threat that the trial court found should be taken seriously), is emotionally unstable and uncooperative, of questionable moral character, engages in chicanery, swears at the children, and demonstrated an inability to put the needs of the parties' children above her own needs. The trial

court also made Findings regarding Brad Childs. Those Findings are set forth in subsection E of the Statement of Facts. These Findings can accurately be referred to as positive regarding Brad's ability to take care of the children. Given the positive Findings that the court has made regarding Brad, and given the trial court's Findings regarding Heather it can hardly be seriously asserted that the trial court abused its discretion in refusing to allow Heather to provide day care for the children.

POINT VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING HEATHER TEMPORARY ALIMONY OF \$350.00 PER MONTH

In Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991), this Court reviewed the often cited three factors that the trial court must consider in determining alimony, those factors being:

"(1) the financial condition and needs of the receiving spouse, (2) the ability of the receiving spouse to produce sufficient income for him- or herself, and (3) the ability of the responding spouse to provide support." Id. at 76.

This Court then went on to state that:

"So long as these three factors are considered, we will disturb a trial court's decision concerning alimony only upon a showing 'that such a serious inequity has resulted as to manifest a clear abuse of discretion.'" Id. at 76 (citations omitted).

The trial court did consider all three of the above-mentioned alimony related factors. Heather makes reference to the court's consideration of these factors in her brief. As the trial court did consider all three of the alimony considerations, it cannot be argued that the trial court abused its discretion.

It is acknowledged that the award of alimony may not have been sufficient to make up the shortfall between Heather's monthly financial needs and the income that she can generate. It is further acknowledged that Brad may have had the ability to pay alimony in an amount equal to the shortfall between Heather's monthly needs and monthly income. The trial court indicated that it was considering Heather's fault in making the alimony award. Pursuant to §30-3-5(7)(b) Utah Code Ann., the trial court "... may consider the fault of the parties in determining alimony." There is no case law nor statutory guidance as to how much or how little an alimony award is to be effected by fault. In the absence of such guidance, the trial court may adjust alimony based on fault as long as such adjustment did not result in a clear abuse of the trial court's discretion. Given the Findings that the trial court made regarding Heather's behavior, the trial court's adjustment of alimony is well within the trial court's discretion.

POINT VIII

HEATHER HAS FAILED TO DEMONSTRATE THAT THE COURT ABUSED ITS DISCRETION IN AWARDING HER AN ATTORNEY'S FEE OF \$1,000.00

This Court stated that in Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991), that:

"The decision to award fees rests within the sound discretion of the trial court, but, as with alimony awards, the decision must be based on evidence of financial need and reasonableness. ... We will reverse an award of attorney fees and costs when either financial need or reasonableness has not been shown." Id. at 77 (citations omitted).

Heather has failed to demonstrate that the award of attorney's fees of \$1,000 was unreasonable. Heather does accurately recap that Brad's income is greater than her income. Heather

does little more than to point out the differences in the parties' incomes. Heather does not state, for example, what debts or obligations Brad has or provide any other information related to Brad's ability to pay attorney's fees. Having made only a cursory attempt to demonstrate that the trial court's ruling was inequitable and failing to make any serious attempt to marshal the evidence in this regard, Heather's contention that the trial court abused its discretion is without merit.

V. CONCLUSION

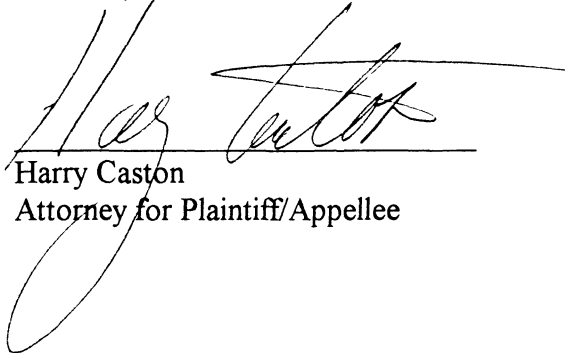
That the Appellee respectfully requests that this Court affirm the ruling of the trial court.

VI. ADDENDUM

A. No addendum is necessary.

Respectfully submitted this 13th day of March, 1998.

McKAY, BURTON & THURMAN

A handwritten signature in black ink, appearing to read "Harry Caston", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Harry Caston
Attorney for Plaintiff/Appellee

MAILING CERTIFICATE

I hereby certify that on the 13th day of March, 1998, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was mailed, postage prepaid, to the following:

Randy S. Ludlow
336 South 300 East, Suite 200
Salt Lake City, UT 84111-2504

A handwritten signature in cursive script, appearing to read "Barbara L. Townsend", written over a horizontal line.

Harry Caston
Barbara L. Townsend

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